IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 11291 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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AVNI KANTILAL KALARIA - Petitioner
Versus
DHANJIBHAI NAGJIBHAI PADMANI & 1 - Respondents

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Appearance :
MR PERCY KAVINA WITH MS MO NARSINGHANI for the Petitioner.
MS MAMTA R VYAS for Respondent No.1.
RULE SERVED BY DS for Respondent No.2.

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CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 11/12/2007

ORAL JUDGMENT

This petition has been preferred against the order dated 3rd March,2007 passed by learned 7th Fast Track Court,Rajkot in Misc.Civil Appeal No.41 of 1998, whereby the appeal preferred by the original plaintiff was allowed and the order dated 28th January,1998 passed by the Small Cause Court, Rajkot dismissing Exh-5 application in Regular Civil Suit No.122 of 1997 was quashed and set aside. Thus, Trial Court has not granted the stay to the original plaintiff and the Lower Appellate Court has allowed the Appeal of the original plaintiff and grated stay. Against this order, original defendant has preferred this petition.

2. Having heard the learned counsel for both the sides and looking to the facts and circumstances of the case and evidence on record, I see no reason to entertain this petition, mainly for the following facts and reasons:

(i) Prima facie, it appears from the facts of the case that the present petitioner is original defendant. The present respondent is original plaintiff, who is tenant in the suit premises, and has instituted Regular Civil Suit No.122 of 1997 for permanent injunction and declaration along with Exh-5 application i.e. injunction

application. Since last about 13 years, it is contended by original plaintiff that he is in possession of the suit premises but as the landlord- present petitioner (original defendant) was giving threats to the tenant, the Suit was instituted by the tenant. Exh-5 application was dismissed by the Trial Court whereas the lower Appellate Court has allowed Civil Misc.Appeal preferred by the original plaintiff and thereby, quashed and set aside the order passed by the Trial Court.

(ii) Looking to the facts of the case, prima facie, it appears that there are electricity bills, which were presented in the Trial Court, which reflect usage of electricity in the suit property. The consumption is nil since January,2003 onwards. Looking to the facts of the case, it is contended by original plaintiff in the plaint that the landlord is administering threats to vacate the suit premises. Looking to the electricity bills, there is consumption of electricity before filing of the suit. Thus, the property was in usage by the tenant.

(iii) Looking to the facts of the case, prima facie, it appears that the main contention of the original defendant that the plaintiff was tenant, who has handed over the possession of the suit property since last two

years. The said property is not being used and electricity connection has also been disconnected. Looking to the electricity bills presented before the Trial Court, there is usage of electricity in the suit premises. Not only this but looking to the municipal valuation – assessment tax bill also, the name of original defendant is reflected as occupier.

(iv) It is correctly observed by lower Appellate Court in the impugned order that at Exh-5 application, the defence of the original defendant that the tenant has vacated the premises and handed over the possession to the landlord, can be gone into, at the time of hearing of the trial. It is a matter of evidence. In view of these facts, there is prima facie case in favour of the original plaintiff. Balance of convenience is also in favour of the original plaintiff and irreparable loss will be caused to the original plaintiff, if stay as prayed for is not granted. This aspect of the matter has been correctly appreciated by the lower Appellate Court.

(v) One more attempt was made by original defendant before, lower Appellate Court by giving an application on 18th March,2000 that one Shri Jesingbhai Chawda is already inducted as a tenant of the suit property. This aspect of

the matter has not been properly appreciated by the lower Appellate Court and therefore, the order passed by the lower Appellate Court is true and correct. This contention of the original defendant is not accepted by this Court firstly for the reason that never this additional fact was brought on record with the help of any affidavit before the lower Appellate Court. Secondly for the reason that no other supporting material of this two lines application, (given by advocate) dated 18th March,2000 was ever presented before the lower Appellate Court. Just a sentence has been thrown before the lower Appellate Court that Jesingbhai Chawda is occupying the premises as a tenant. Nothing has been stated by the landlord by his signature or affidavit, since when he is inducted as tenant or is there any electricity bill in favour of new tenant or municipal tax bill reflects new tenant as occupier. No rent receipt has been produced in written statement before the Trial Court and no reply of Exh-5 application reflects the name of second alleged tenant and rightly therefore, lower Appellate Court has ignored this application given by the advocate of the defendant dated 18th March,2000. On the contrary, this will be a matter of evidence. Original plaintiff will test this evidence by proper cross-examination and at this Exh-5 injunction application stage, this two lines

sentence dated 18th March,2000, spoken by advocate of the original defendant without any support of evidence, has rightly been not considered by lower Appellate Court. No error has been committed by the learned 7th Fast Track Court, Rajkot in allowing Appeal preferred by the original plaintiff vide order dated 3rd March,2007.

(vi) So far as panchnama is concerned, it is rightly observed by the Trial Court, that electricity bill reflects name of original plaintiff and there was use of electricity also at the relevant time. Key of the suit premises was also given by plaintiff, as per panchnama.

(vii) Learned counsel for the petitioner has relied upon the judgment delivered by the Hon'ble Supreme Court reported in **2006(3) SCC 312**. Looking to the facts of the case cited before this Court, there was question of possession and dispossession and again grant of possession of the property whereas looking to the facts of the present case, in my opinion, the original plaintiff has not handed over possession, looking to the documentary evidence as referred herein above, the aforesaid authority is not helpful to the petitioner.

3. In view of the aforesaid facts and reasons,

there is no substance in this petition and, therefore, the same is dismissed. Rule is discharged with no order as to costs.

(D.N.PATEL,J)

4. Learned counsel for the petitioner (original defendant) prayed for extension of the stay granted earlier. Learned counsel for the plaintiff opposed the same. Looking to the aforesaid facts and reasons, the request made by learned counsel for the petitioner is not accepted by this Court.

(D.N.PATEL,J)

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